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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 962

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,
Appellants,
vs.
JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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1. THE SENATE

The complete absurdity of a plan of legislative representation based *literally* on area becomes manifest in the tortured efforts of appellees *Faville* and *Beadle et al.*[1] to justify its irrationality.

Apart from the platitudinous refrains, not unfamiliar to this Court, of "adequate representation", "effective representation", "representation for all the people", and of each state's "uniqueness", appellees Faville and Beadle find great difficulty agreeing with the Court below, with each other, and with themselves as to just how and why it can be constitutionally permissible for one citizen's vote to be worth more than four times another's, for minorities to perpetually control both houses of a state legislature, and for a state to literally provide for the representation of space.

For example, the majority below justified the literal area representation formula as a deliberate and permissible effort to aid a particular "impoverished" region of the state—in other words, to grant a political subsidy to those said to be suffering a *paucity* of economic interests. But appellees would justify the same plan for the same region because of the asserted *multiplicity* of those interests. Both are clearly wrong.

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[1] Hereafter, unless context indicates otherwise, "appellees" refers to appellees Faville and Beadle et al., and not appellee Hare, the Secretary of State, who, represented by the Attorney General, concurs with appellants.

As the legislative history, recounted in the margin, demonstrates,[2] there was only one objective on the part of the framers of this document, who openly abandoned all pretense of representing "interests" or "accessibility" or

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[2] When challenged to explain the specific 4-1 ratio of the "80%-20%" formula Dr. John Hannah, chairman of the legislative apportionment committee, told the convention:

"Dr. Pollock rather criticizes it because he says that the committee report doesn't factually point up how we arrived from where we started to where we finished. We started with the notion, as I have indicated before, that at least one house of the Michigan legislature was going to take into consideration *some* factor besides straight population, and the decision was finally made that that was going to be the state senate.

"Then the next question that had to be answered was: what factors are you going to give consideration to? We were importuned that we should give consideration to area for many reasons which I will not repeat and bore you with this afternoon. Points were made that if you were doing this ideally, we ought to somehow or other make certain that in the legislature all of the important economic groups of the state have representation, that the northern part of the state with its sizable resort and tourist interests should have representation, agriculture should have representation, mining should have representation, the varied manufacturing interests of the state should have representation, people living in the urban areas certainly should have representation and so forth. The question became: how are you going to do this? And we spent weeks at it. And finally the William Hanna proposal, the genesis of it—and there was never any secret about it; all of our meetings were open; many of you attended them—we came up with the decision tentatively that we ought to be honest about it and that some fraction of the senators should be assigned on the basis of *something besides population*. And the proposal that I made before the committee and that they finally improved upon was that *we say forthrightly that 8 members of the senate should be apportioned on factors other than population, and then the difference between 8 and whatever the total was to be, 31, 38 or 40, we would apportion on population.*" (Convention Record pp. 2094, 5, April 3, 1963. Emphasis supplied.)

* * * * *

"The committee, after a good deal of thought, came to the conclusion—and I am sure the committee was correct—that the best interests of this state are going to be served if one house of the legislature is apportioned on *some* basis other than straight population. The committee decided that it would be the senate that

(Continued on next page)

other values, and in fact acknowledged that the plan "discriminated against the counties with the largest population":[3] that single objective was to arbitrarily take 8 seats

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(Continued from preceding page)

would be apportioned on *some* basis other than straight population. It then gave consideration to what factors should be given consideration: obviously area was one factor. The suggestion was made that it would be appropriate to take into consideration economic interests because of the diversity of interests in some areas. And there were other suggestions. *Finally, because of the difficulty of identifying anything but area, the committee concluded that area and population were the only factors that it could recommend to this convention.*

"Then the question came as to what emphasis would be placed on area. And at this point, after a good deal of thought by all members of the committee, I think we concluded that the fairest proposition would be to come to you recommending that there be a definite number of senators allocated on area; and you will recall that this was a statement I made before. My proposal to our committee was that we be objective and fair and forthright about it; and I proposed that we divide the state into 4 geographic areas approximately equal in population [sic], but vastly different in area [sic]: the upper peninsula, the northern half of the lower peninsula, southwest Michigan, southeast Michigan and that we allocate 8 senators on an area basis, 2 to each region. And then we faced the problem of how to allocate the seats within the region. And of course we came to the conclusion that the only way that you could allocate the seats within the region would be on the basis of population. And if we were to follow that proposal, which was a personal proposal, it had the effect, in southeastern Michigan, of putting the area senators into Wayne county *because that's where the people are. And that wasn't the reason for the area senators in the first place.*

"Then Mr. William Hanna devised the formula which we presented to you before and again today, and that was the one that we come up with a factor per county, with 20 percent of the factor [sic] in each county based on area and 80 per cent of the factor [sic] in each county based on population. And that's the one before you." Convention Record, p. 2808 (April 25, 1962). (Emphasis added.)

[3] In resisting a particular variation of the "80-20" formula which it was felt would expose it to undue judicial risks, William F. Hanna, acknowledged author of the formula, told legislative apportionment committee members:

"We should be very careful not to load the Senate twice against the counties with the largest population *by first discriminating against them with the 80-20 formula* and then again discriminating against them in the application of the formula in creating Senatorial districts." (Emphasis added.) (Exhibit L, below.)

—*not 4, as asserted by appellees*—out of 38 (or "20%") as a net shift from metropolitan to rural areas, and to do so in a way thought constitutionally passable in the wake of *Baker v. Carr*. Only thus could the status quo substantially be maintained. And, constitutional infirmities aside, it was. For when all is said and done, northern Michigan, as defined by appellees and the Court below (the Upper Peninsula and the northern lower peninsula), *continues* to have just over 6 senators, with a population entitling it to 3—*exactly as it did under the 1952 apportionment plan invalidated in Scholle v. Hare*, 367 Mich. 176, No. 24, this Term, *sub nom., Beadle v. Scholle* (as vividly demonstrated by the over-lay map appended to this brief). Moreover, while Wayne County (Detroit) receives 10 seats under the new constitution, as distinguished from 7 under the old, its increase in fact is diluted in the enlarged Senate of 38 (increased 4 from the previous 34) and it still gets less than the 13 to which its population entitles it. Finally, a majority of people still lack the majority control and the degree of representation to which their numbers entitle them, artificial aggregations of arbitrarily defined "urbanized areas" to the contrary notwithstanding.

The fact of the matter is that the "80-20" formula does none of the things its apologists claim.

Clearly, if there is anything the present formula does *not* do, it is to represent "diverse interests". Even if we ignore the legislative history cited earlier, in which any pretense of representing specific and diverse "interests" was abandoned; even if we ignore the proposition that "discriminations are not to be supported by mere fanciful conjecture", *Hartford v. Harrison*, 301 U.S. 459, 462; *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209; and even if we ignore the basic precept that in a democratic

society special and favored classes of voters can not be created at the expense of others, the fact is that this plan, or any plan of literal area representation, invidiously favors certain citizens and disfavors others on a totally different basis, namely, with respect to the number of acres surrounding each. For, far from according representation to diverse interests, the literal representation of space inherently does the opposite, for in premise and design it accords representation irrespective of the existence of human habitation or activity, or its variety. Thus, an acre in downtown Detroit on which a crowded apartment or office building stands receives no less or more area (not people) representation than the acre, for example, of uninhabited forest land to the north. By the same token, the land, however valuable, upon which an auto manufacturing plant is located, is treated no differently than the farm land of equivalent size, whether of good, bad, or indifferent fertility. And the up-to-40 acre lakes, which are defined as "land" for purposes of this plan under borrowed U. S. Census Bureau definition, will also be treated as well, as will the cut-over land, swamps and state and federal forest lands of the Upper Peninsula. Indeed, a huge part of all the "area factors" which "northern Michigan" will receive under the plan will come from substantially uninhabited *public* lands—state and federal—whose "credits" will go, not to all the citizens of the state who own it, but inequitably to those who fortuitously happen to live next door. And no matter how many of these persons may hereafter move elsewhere, and no matter whether the Upper Peninsula is tomorrow "impoverished" or prosperous, this plan will in perpetuity grant continued space representation. In fact, should the arbitrarily selected "interests" of "heavy industry, farming, tourism, lumbering and mining" be wiped out in the morning, the land presently involved would still qualify for unabated

"area factors", to even more enhance the representation of declining human population left behind.

Nor does the plan square with pretentions of "effective representation" and "accessibility". For one thing, the literal representation of space or area—that is, the "measure of surface extent" as dictionary-defined—clearly is irrelevant to communication or "accessibility"; for if in the real space and electronic age of 1964 "accessibility" is a function of distance at all—which we dispute[4]—it is at most of *linear* distance on modern superhighways with modern automobiles. But "accessibility" is not basically a function even of linear distance, for the proffered image of the circuit riding legislator endlessly huddling with each constituent is preposterous. If direct communication should ever occur between them, it will as easily be effected in rural areas as urban by the same 5-cent stamp or instantaneous phone call. Moreover, in terms of mass media of communication, namely, press, radio and TV, the competition for space and time for news coverage and the cost for political advertising will be far less, with the coverage and efficiency far greater, in "outstate" than in metropolitan areas.

Nor will the absurdities of the present plan vanish in the face of the purported "deliberate" choice of the people in adopting them. As noted before, (1) constitutionally, the

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[4] So did the constitutional convention. Delegate Cushman proposed an amendment which—constitutional issues aside—would have squarely assuaged professed majority-delegate concerns about sparsity-accessibility problems in large area districts. She proposed that 39 districts be formed of counties or groups of counties, each having approximately 1/39th the state's population, *with no district to exceed 10% of the state's land area.* (Convention Record, p. 2173, April 5, 1962.) On recommendation of the chairman of the legislative apportionment committee, the proposal was defeated. (Convention Record p. 2174, April 5, 1962.)

argument is irrelevant; (2) the measure of adoption was infinitesimal, less than one-half of one percent; (3) the apportionment provisions were not, in fact, voted upon at all, but were merely adopted as part of an entire constitution; (4) the complexity of these provisions was great and it is obvious that the voters could not have "deliberately" evaluated their minutiae; (5) the proposal's general import was misrepresented to the public, which was repeatedly told that the plan established a formula of uniform representation for every section of the state (and certainly not a favored program for northern Michigan); and (6) the leading proponents of the plan, including the present Governor, told voters to approve the constitution *despite* these provisions, which presented, they said, a legal question for ultimate judicial, not political, determination.

At least the 2-1 court below *professed* to concede that population representation was the starting constitutional standard and that departures from that standard—i.e., districts of equal population as nearly as practicable—must be rationally based and be reasonable in degree. Judge Kaess professedly adopted the formulation of Solicitor General Cox, namely, that a violation of the Fourteenth Amendment in the legislative apportionment context will *at least* occur in any one of three instances: (1) when an apportionment creates substantial inequalities in representation without rhyme or reason, i.e., is without *any* discernible basis; (2) when discrimination results from criteria, however intelligible, which are irrational, invidious or irrelevant—that is, are *qualitatively* defective; and (3) when an apportionment plan subordinates the principle of popular representation to an excessive degree—in other words, is *quantitatively* excessive.

Appellees' startling contrary premise—that substantial adherence to population in one house excuses *any* gross departure in the other "since any apportionment not based strictly on population will produce variations in the number of persons represented by a legislator"—must surely underlie their pleas for affirmance, for no rational or consistent justifications—pretentious slogans aside—are offered for the challenged plan.

Clearly no amount of after-the-fact rationalization can turn this sow's ear into a silk purse; it is an incredible and outrageous affront to democracy.

2. THE HOUSE OF REPRESENTATIVES

Appellees' extravagant efforts to prove the House provisions to be strictly population based are similarly without merit. The simple answer to their contention is that the very map and tables relied upon by them result from a misapplication of the House formula. Specifically, appellees suggest that that clause which gives to each county or group of counties a seat upon attaining 7/10ths of 1% of the state's population is permissive rather than mandatory. But the language itself is to the contrary; the official message of the Constitutional Convention is to the contrary; the legislative history is to the contrary; and the historical antecedents of this clause, intended to *guarantee* under-populated counties minimal representation, are to the contrary. The necessary and unfortunately correct application of the "modified moiety" (.7%) clause is that from it alone there is a predictable net 4-seat shift from populous to less populous areas,[5] which is coupled with the

[5] Judge Kaess virtually concedes as much. See Opinion, Jurisdictional Statement, p. 7a.

2-1 population disparities and other departures from a population standard, of which Judge Roth wrote in dissent below.

Neither house is population-based.

3. SUMMARY

Appellees' briefs only confirm what our Jurisdictional Statement has heretofore set forth—that there will be Senate district disparities in population exceeding 4-1 and House variations of 2-1; that there will be a net 8-out-of-38 seat shift (20%) between more populous and less populous areas in the Senate and lesser departures in the House; that there will be perpetual minority control in both chambers; and that the disparities will constantly get worse. Most important, all of the disparities result arbitrarily, unnecessarily and without constitutional justification from the acknowledged invidious purpose of favoring ("weighting") some citizens over others. Unless the decision below is reversed, there will have occurred for the first time in the history of the United States a deliberate plan—and national blue-print—of favoring some citizens at the expense of others, through the device of the literal representation of space. Surely, no such result can be countenanced under the Fourteenth Amendment.

We pray review and reversal.

Respectfully submitted,

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Dated: May 7, 1964.

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[EXISTING DISTRICTS]

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